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90-201

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLONIAL VILLAGE, INC.,

Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals correctly construe the Fair Housing Act as creating a private cause of action based solely on the fact that none of the approximately ten human models shown in six prototype newspaper advertisements for the petitioner's residential condominium development, which appeared in *The Washington Post* on a total of 32 days between January 1, 1985 and April 26, 1986, were identifiable as black persons? If so, does the Fair Housing Act violate the First Amendment?

2. May the judicially-created "continuing violation" exception be applied to override the period of limitations set forth in the Fair Housing Act, thereby allowing plaintiffs to sue on newspaper advertising claims which accrued prior to the limitations cutoff, where no discrete violation occurred within the statutory period?

3. Consistent with Art. III standing requirements, may an individual newspaper reader, who allegedly incurred "indignation" and "distress" as a result of seeing petitioner's advertising, be allowed to prosecute independent claims for damages, injunctive relief and declaratory relief in federal court, simply because other co-plaintiff organizations are deemed to have standing to litigate their own distinct claims in the case?

PARTIES

In addition to the parties named in the caption of this petition, the parties to the consolidated proceedings in the court of appeals included Mobil Land Development Corporation ("MLDC"), Marvin J. Gerstin and Marvin Gerstin Associates, Inc.

All of the stock of petitioner Colonial Village, Inc. is owned by MLDC, which is a wholly-owned subsidiary of the Mobil Corporation, a publicly-held corporation.

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OCTOBER TERM, 1990

COLONIAL VILLAGE, INC,

Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,

Respondents.

Colonial Village, Inc. petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit. In accordance with Rule 29.4(b) of the Supreme Court Rules petitioner notes that 28 U.S.C. §2403(a) may be applicable, in that the constitutionality of the Fair Housing Act, as applied by the court of appeals, is drawn into question, and neither the United States nor any department, office, agency, officer or employee thereof is a party. Certification pursuant to 28 U.S.C. §2403(a) was not made to the Attorney General by the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals, reproduced in the separately printed appendix at App. A, pages 1a-21a, is reported as *Spann v. Colonial Village, Inc.*, 899 F.2d 24. The opinion issued by the district court on May 22, 1987 is reported under the same caption at 662 F.Supp. 541 and reproduced at App. F, pp. 29a-41a. A subsequent memorandum of the district court dated October 13, 1988 is reported at 124 F.R.D. 1 and is reproduced at App. H, pp. 45a-49a.

JURISDICTION OF THIS COURT

The judgment of the court of appeals was entered on March 13, 1990. A timely petition for rehearing was denied by the court of appeals on May 3, 1990. (App. E, 27a-28a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Art. III, sec. 2 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority; . . .

The First Amendment of the Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Section 804 of the Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3604, as amended, provides in relevant part as follows:

> . . . [I]t shall be unlawful—
>
> * * *
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Section 812(a) of the Fair Housing Act, effective at the time the complaint was filed in the district court and then

codified at 42 U.S.C. §3612(a), provided in relevant part that:

> The rights granted by [section 804] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. . . .

Section 812(c), 42 U.S.C. §3612(c), at that time provided:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

The provisions of section 812 were subsequently amended by section 8(2) of the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1633, and replaced by a new section 813, now codified at 42 U.S.C. §3613, providing among other things for a two-year statute of limitations for private civil actions and elimination of the statutory cap on punitive damages. This statutory revision became effective on March 12, 1989, 180 days after its enactment and approval by the President on September 13, 1988. *See* Pub. L. 100-430, sec. 13(a).

FOR JULIE AND ME, 'HAPPILY EVER AFTER' BEGAN IN OUR VILLAGE BY THE CITY.

It's as close to the story book life as we ever thought we'd get. A picturesque little village. Right next door to D.C. in Rosslyn. A private, wooded setting just one mile from the Key Bridge, where we can walk to all the things that make life enjoyable. The stores. The restaurants. Even the Courthouse Metro. And the homes! Quiet and solid. Beautifully designed interiors with new baths and insulated windows. New walls and floor coverings. New plumbing and wiring. New kitchens and appliances. Even a new heat pump system. Take it from us. If you want the real story on the very best of condominium living, you'll find your happy ending in our *Village by the City.* Visit today.

Directions: From Rosslyn, take Wilson Blvd. to right on Rhodes St. and follow signs to the sales office. Or from Lee Highway, go right on Veitch St., then left on Key Blvd. to sales office. Open 11-5 daily, except on Wednesdays. Phone 276-0200. Brokers Welcome 3%.

EQUAL HOUSING OPPORTUNITY

Colonial Village

YOUR VILLAGE BY THE CITY.

STATEMENT

A. Facts.

Petitioner Colonial Village, Inc. ("Colonial") is the owner and developer of a residential condominium project in Arlington, Virginia. From time to time Colonial has commissioned advertisements for its development to be prepared by an outside advertising agency and published in *The Washington Post*. During 1985, three prototypes for such ads were used, appearing in that newspaper a total of 22 times. From January 1 through April 26, 1986, three similar ads were used and appeared a total of ten times. Over this sixteen month period, Colonial ads were published on the average every 15 days, or roughly twice a month, normally appearing in the Saturday real estate section but sometimes in the paper's Friday editions. After April 26, 1986, a fourth prototype ad was added for use in rotation with the other three during the remainder of that year.

The seven ads used during 1985 and 1986 each featured a photograph of a young working person or couple in a social, recreational or commuting setting. Typical of the 1985-1986 advertisements was the prototype reproduced on the preceding page, which appeared in *The Washington Post* on Saturday, April 26, 1986 with the heading:

> **FOR JULIE AND ME,**
> **'HAPPILY EVER AFTER' BEGAN**
> **IN OUR VILLAGE BY THE CITY.**

Under the picture of a couple apparently strolling home from shopping, the text of this ad read as follows:

> It's as close to the story book life as we ever thought we'd get. A picturesque little village. Right next door to D.C. in Rosslyn. A private, wooded setting just one mile from the Key Bridge, where we can walk to all the things that make life enjoyable. The stores. The restaurants.

> Even the Courthouse Metro. And the homes! Quiet and solid. Beautifully designed interiors with new baths and insulated windows. New walls and floor coverings. New plumbing and wiring. New kitchens and appliances. Even a new heat pump system. Take it from us. If you want the real story on the very best of condominium living, you'll find your happy ending in our Village by the City. Visit today.

Also included were directions to the project, its office hours and telephone number. At the bottom of the ad appeared the Colonial Village logo, the "EHO" logo reflecting the developer's compliance with fair housing laws as suggested by the U. S. Department of Housing and Urban Development ("HUD"), 24 C.F.R. §109.30, and the phrases **"EQUAL HOUSING OPPORTUNITY"** and **"YOUR VILLAGE BY THE CITY"** in bold print.

On April 24, 1986, parallel administrative complaints against Colonial, its advertising agency and Colonial's parent corporation were filed with HUD and the District of Columbia Office of Human Rights ("OHR"). The complainants were Girardeau Spann, a black resident of Washington, D.C. who is a professor of constitutional law at Georgetown University Law Center, and two nonprofit advocacy groups, the Metropolitan Washington Planning and Housing Association, Inc., and the Fair Housing Council of Greater Washington. Those complaints alleged that the 31 advertisements for Colonial Village that had appeared in *The Washington Post* during the preceding sixteen months violated section 804(c) of the Fair Housing Act by failing to include any black persons in the photographs. Neither agency has taken any enforcement action to date on those 1986 administrative complaints.

B. District Court Proceedings.

Professor Spann and the two advocacy groups filed suit in the district court, seeking compensatory and punitive

damages as well as injunctive relief and a declaratory judgment against Colonial Village and Mobil Land Development Corporation ("MLDC") on October 23, 1986. Federal subject matter jurisdiction was invoked in the complaint under 28 U.S.C. §§1331, 1337, 1343(4) [*sic*], 2201 and 42 U.S.C. §3612.

The complaint alleged that Colonial violated section 804(c) of the Fair Housing Act because no black human models were shown in its advertisements for the project, although white models were depicted. That fact alone was alleged to indicate an illegal preference based on race.[1] As a result of viewing such ads in *The Washington Post*, plaintiff Spann allegedly "was offended by those ads due to their clear indication of racial preference" and, as a black person, incurred "indignation" and "distress" as a result. The advertising was also alleged to have interfered with both plaintiff organizations' programs to bring about equal opportunities in housing and with their members' rights to receive information about housing "free from indications of racial preference." MLDC was included as a defendant on grounds that, as the corporate parent of Colonial, it "is responsible for the actions and omissions of its subsidiary." The complaint demanded a trial by jury on all issues.[2]

On February 24, 1987, Colonial moved for summary judgment on the Fair Housing Act claims. Colonial did not

[1] The complaint also asserted that advertising for Colonial Village violated the Civil Rights Act of 1866, 42 U.S.C. §§1981 and 1982. The district court's dismissal of this claim for failure to state a claim upon which relief could be granted was affirmed by the court of appeals, and those issues are no longer involved in the case.

[2] The suit against Colonial and MLDC was consolidated by the district court, for purposes of briefing, with a separate, parallel action against the advertising agency employed by Colonial (which was promptly settled and dismissed) and a third similar action brought by the same plaintiffs against Marvin J. Gerstin and Marvin Gerstin Associates, Inc., who have had no relationship to Colonial or MLDC outside of this litigation.

dispute that none of the approximately five human models shown in its three prototype ads used in 1985 and the five models shown in the three similar ads which ran from January, 1985 through April, 1986 were identifiable as black persons, but the motion stressed that plaintiffs were unable to establish that any violation of section 804(c) had occurred within the applicable limitations period.

By the affidavit of its vice president Dale R. McGinley and other evidence filed in support of the motion, including the ads themselves, the company established that during the 180 days preceding October 23, 1986, the day on which the complaint was filed, over 28 percent of Colonial's advertisements appearing in *The Washington Post* featured a black model; that none of Colonial's ads have contained any statement indicating or suggesting a racial preference; and that every Colonial ad since January 1, 1985 included the words "EQUAL HOUSING OPPORTUNITY" and the HUD logotype symbol for nondiscrimination in housing. The McGinley affidavit further established the absence of any discriminatory intent on Colonial's part at any time. Its management did not select models for the advertisements, which was left up to the advertising agency, although it had reviewed and approved the ads before publication. The Colonial management never directed or suggested to the agency that a racial preference be indicated or that models be selected based on their race, which Mr. McGinley swore "would be absolutely contrary to our company policies and purposes." (App. I, 50a-52a). The company in fact remained unaware of any alleged racial imbalance in the models prior to the administrative complaints made to HUD and OHR on April 24, 1986.

These points were reflected in a statement of material facts not in genuine dispute, which Colonial filed with its summary judgment motion pursuant to Local Rule 108 of the district court. (App. I, 52a). Colonial's properly supported motion shifted the burden to plaintiffs to present affirmative evidence of "specific facts" showing a "genuine

issue for trial" under Fed. R. Civ. P. 56(e), sufficient to allow a "reasonable jury" to decide in plaintiffs' favor.[3]

Significantly, although the complaint had originally alleged that Colonial "acted with intent in depicting only white models in its advertisements," the plaintiffs' summary judgment opposition papers expressly—and emphatically—disavowed any effort to demonstrate such intent to establish liability. Thus, for example, in their response to Colonial's Local Rule 108 statement of material facts, plaintiffs declined to challenge the evidence that Colonial had been unaware of any racial imbalance, was not involved in selection of the models and had never caused the advertising agency to indicate racial preference in the ads or to select models based on race.[4] Instead they asserted flatly that, "[t]o establish Colonial Village's liability under the Fair Housing Act *plaintiffs need not show either the discriminatory intent or direct supervision of Colonial Village. . . .*" (App. I, 52a-53a; emphasis added). Under their view of the law, the mere fact that identifiably black persons did not appear in Colonial's series of six newspaper ads, which ran for 16 months in 1985 and early 1986, was alone sufficient to subject Colonial to liability for damages and injunctive relief, even if Colonial had no

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[3] *Waters v. Thornburgh*, 888 F.2d 870, 873 (D.C. Cir. 1989), citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); see also *Lujan v. National Wildlife Federation*, 58 U.S.L.Week 5077, 5082 (U.S., June 27, 1990) (general averments in affidavits opposing summary judgment fail to meet specificity requirement of Rule 56(e)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029 (D.C. Cir. 1988).

[4] Under the local district court rule, factual assertions contained in the movant's statement of undisputed facts supporting a motion for summary judgment may be taken as admitted if not specifically controverted in a statement of genuine issues filed by the opposing party. U.S. District Court, District of Columbia, Rule 108(h); see *Twist v. Meese*, 854 F.2d 1421, 1423-25 (D.C. Cir. 1988), *cert. denied*, 106 L.Ed.2d 612 (1989).

part in selecting the models and lacked any discriminatory purpose.[5]

The district court granted summary judgment in favor of Colonial and also granted the Gerstin defendants' parallel motion for summary judgment on the claims under section 804(c) of the Fair Housing Act. (App. G, 43a). Focusing on the period commencing on April 26, 1986, the 180th day preceding the filing of the complaint, consistent with the 180-day limitations provision then contained in the Fair Housing Act, the district court found that over 28 percent of the Colonial Village ads appearing in *The Washington Post* from that day until the complaint was filed featured a black model. (App. F, 32a, 39a). Furthermore, the district court found:

> None of Colonial's ads, *at any time*, has contained language indicating or suggesting a racial preference. To the contrary; *all of its ads* in *The Post* have included the phrase "Equal Housing Opportunity" as well as a related logo.

Id., 32a (emphasis added). The district court declined to construe section 804(c) as *requiring* the use in advertising of models of a particular race or sex in particular proportions, holding that this would lead to impracticable and absurd results that Congress could not possibly have intended and would have a "chilling effect . . . on advertisers' ability and desire to advertise, implicating First Amendment concerns." (App. F, 37a). In light of these concerns, it held, an element of discriminatory intent had to be proved in a section 804(c) action, either by direct evidence or by inference to be drawn from extrinsic or historical evidence:

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[5] Plaintiffs also filed their own motion for judgment on the pleadings or for summary judgment, based solely on the absence of black models in Colonial's ads that appeared in *The Washington Post* during a sixteen month period from January 1, 1985 through April 26, 1986, again disclaiming any attempted proof of discriminatory intent.

> When the Congress prohibited advertisements that indicate a discriminatory preference, it could only have intended that the preference be either obvious from the ad itself . . . or that such preference be ascertained through extrinsic circumstances. . . . Usually the proof of such extrinsic circumstances will implicate an element of discriminatory intent. . . . [*A*]*bsent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads.*

Id. (emphasis added).

During the statutory limitations period, the district court ruled, the defendants did not possess the requisite discriminatory intent, and "indeed, neither defendant's ads or ad campaigns indicated a racially discriminatory preference during that period under any standard." (App. F, 39a). This conclusion was buttressed by findings that the percentage of Colonial ads featuring black models actually exceeded the proportion of black persons in the Washington metropolitan area population and that Colonial in April, 1986 had adopted a written policy specifically requiring nondiscrimination in the selection of models for its advertising. "In brief," the district court held, "there was no conceivable violation by either defendant during any period not barred by the statute of limitations." (App. F, 39a).

The plaintiffs immediately noted an appeal, which was dismissed by the court of appeals as premature. (App. B, 22a-23a). Subsequently the district court entered an order on October 13, 1988, denying the motion of defendant MLDC to dismiss the complaint against it for failure to make timely service of process under Fed. R. Civ. P. 4(j) or to quash service of process. (App. H, 49a). Plaintiffs

thereupon filed a new notice of appeal in their action against Colonial on November 10, 1988, which was docketed in the court of appeals as No. 88-7257 and consolidated there with plaintiffs' appeal in the Gerstin case, D. C. Cir. No. 88-7260.

C. The Decision of the Court of Appeals.

The court of appeals reversed the district court's award of summary judgment on the claims under section 804(c). First addressing the issue of standing, the court held that the two plaintiff organizations had alleged interference and detriments to their programmatic interests sufficient to meet the injury-in-fact, causation and redressability tests for Art. III standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). (App. A, 4a-12a). No prudential standing analysis was deemed necessary, again under authority of *Havens*. (*Id*). The appeals panel declined to decide whether the individual plaintiff had standing to litigate his personal claims for compensatory and punitive damages and other relief or whether the organizations possessed standing to pursue claims as representatives of their members, holding that these determinations were not necessary in light of its conclusion that the organizations had standing to proceed on their own behalf. (App. A, 9a n.2).

Turning to the merits, the court of appeals agreed that summary judgment would have been proper if the 180-day pre-complaint period were the appropriate time frame for analysis. (App. A, 20a). But, the court stated, the complaint against Colonial focused on the company's advertising from January, 1985 to April, 1986. Throughout that sixteen month period, six Colonial Village ads appeared in *The Washington Post* a total of 32 times; each of those six ads featured one or two human models, none of whom was identifiably black. The last of what plaintiffs alleged was the "long stream of all white ads" during this period appeared on April 26, 1986, exactly 180 days before the complaint was filed. Based on this, the district court was

reversed on grounds that it erroneously failed to consider the prelimitations period advertising. According to the court of appeals' decision, the appearance of the final so-called "all white" ad for Colonial on April 26, 1986—the last possible day within the limitations period—brought into play the continuing violation doctrine described in *Havens Realty Corp. v. Coleman*, 455 U.S. at 380-381, thereby overriding the statutory 180-day limit and opening up all of the company's advertising since January 1985 for attack. (App. A, 19a-20a).

The appellate court found it "highly unlikely" that any one of the Colonial ads, standing alone, would violate section 804(c)—even without an identifiably black model having been included. (App. A, 19a n.6). The case is thus distinguished in a critical respect from the situation in *Havens*, where the specific conduct relied on to invoke the continuing violation doctrine was itself a clear violation of the Fair Housing Act.

Colonial argued in the appeal that a discrete violation of law had to have occurred within the limitations period to bring the continuing violation doctrine into play, based on *Lorance v. AT&T Technologies, Inc.*, 104 L.Ed.2d 961 (1989), but the court of appeals did not address this point or even mention *Lorance*. Instead it cited its own pre-*Lorance* decision in *McKenzie v. Sawyer*, 684 F.2d 62 (D.C. Cir. 1982), for the proposition that a "defendant's conduct before the actionable period" must be examined "to show the violative character of defendant's conduct in that period," holding further that the district court erred by failing to make such an inquiry. (App. A, 19a n.6). The decision, however, did not explain why such prelimitations conduct would have been relevant in this case, where the undisputed evidence submitted by Colonial established the racially neutral character of each ad on its own as well as the complete absence of any discriminatory intent or even awareness of a racial imbalance in the selection of advertising models at any time, within or without the lim-

itations period; and the plaintiffs submitted no conduct evidence beyond the bare fact that identifiably black models were not included in the six prototype ads that appeared during the prelimitations period.

Moreover, the evidence of violation relied on by plaintiffs was merely the *appearance* of the last challenged ad in the newspaper on the 180th day prior to their complaint, which fell well short of proof that Colonial took any *action* to violate the law within the limitations period. It has never been suggested that the company could have contacted *The Washington Post* on the morning of April 26, 1986 and made arrangements for its ad to appear that very day. Obviously those arrangements had to have been concluded at some point *before* the day on which the ad actually came out. The court of appeals ignored this shortfall in plaintiffs' evidence and did not explain how the *Havens* doctrine could apply at all under these facts.

As in the district court, the plaintiffs continued in the court of appeals to adhere to their position that no proof of discriminatory intent ever need be shown in an action under section 804(c). Unlike the district court, the court of appeals seems to have agreed. Although this issue was never addressed squarely in its opinion, the most reasonable interpretation of the court of appeals' decision in light of the record is that preferential or discriminatory intent was deemed to be not a necessary element of a section 804(c) case against a real estate advertiser. (See discussion at App. A, 10). Had the court of appeals agreed with the district court on this point, it would have had to affirm the summary judgment under Rule 56 because of the plaintiffs' failure to adduce any evidence of unlawful intent, when that issue was squarely raised by Colonial's summary judgment motion. *Lujan v. National Wildlife Federation*, *supra*, 58 U.S.L.Week 5077, 5080-81.

Finally, while the district court had noted that judicial construction of section 804(c)'s constraints on advertising

necessarily implicates First Amendment concerns, the court of appeals ignored that aspect of the case. Its reversal and remand in effect sent the case back for a jury trial based on nothing more than the appearance, over a sixteen month period, of a handful of ads in which pictures of black models happened not to be included. With no evidence of discriminatory intent being required, Colonial's facially-neutral ads may now subject it to liability if a jury in the District of Columbia finds that they can be read as racially preferential or discriminatory. Despite the obviously chilling effect this construction is likely to have on advertisers, the court of appeals never mentioned the First Amendment at all.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Adopted an Illogical and Impermissible Construction of the Fair Housing Act Which, If Allowed to Stand, Would Violate the First Amendment as a Result of Overbreadth and Vagueness.

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 *et seq.*, stands among the most important social legislation ever enacted by Congress. It not only outlaws racial discrimination in housing throughout the nation but even prohibits statements from being made which indicate racial preferences or discrimination in the sale or rental of housing, creating an important area of potential conflict with First Amendment interests. This case calls upon the Court to resolve such a conflict or to avoid it through proper statutory interpretation.

By its terms the Fair Housing Act does not address the selection of human models shown in real estate advertisements, nor does it create any express requirements relating to the models' racial and other minority characteristics. All the statute says is that an advertisement may not

indicate "any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." Sec. 804(c), 42 U.S.C. §3604(c).

The decision of the court of appeals interprets this provision so broadly that a perceived racial imbalance among the human models appearing in an advertisement or advertising campaign may, without more, be a basis for the imposition of liability. All that must be shown to establish a violation of section 804(c), according to its decision, is that the "natural interpretation" of a developer's advertising to a "reasonable reader" is to indicate a racial preference. (App. A, 10a.). The D.C. Circuit leaves it up to the jury's discretion in each case to decide whether or not an advertiser has committed a violation by having too many persons of one race and too few of another shown in its advertising. The ruling provides no standards for determining when a violation may occur, and the sanctions potentially available upon a finding of violation are severe. This construction of the statute raises serious First Amendment issues affecting advertisers, as well as newspapers and other advertising media, that could and should have been avoided.

Each of the 1985 and 1986 Colonial ads, standing alone, was facially neutral and nondiscriminatory. Each one alone was a nondeceptive, proper and lawful form of speech protected by the First Amendment.[6] But when the pho-

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[6] See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In that case the Court specifically focused on the nonverbal and pictorial aspects of advertising, holding that "commercial illustrations are entitled to First Amendment protections afforded verbal commercial speech. . . ." *Id.* at 647. Unlike the situation in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), Colonial's ads cannot logically be viewed as soliciting "illegal" commercial activity, because the element of discriminatory intent found to have been present in *Pittsburgh Press* is absent here.

tographs appearing in these separate ads were considered in the aggregate, the court of appeals found an actionable civil rights claim sufficient to go to the jury.

In short, the holding means that *lawful and protected speech may become illegal merely as a result of its repetition.* Congress certainly did not have this absurd result in mind when it enacted the Fair Housing Act in 1968.

In *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), the Fourth Circuit first addressed the complex interplay between the restrictions on advertising imposed under the Fair Housing Act and the First Amendment. *Hunter* was an action brought by the Justice Department against a newspaper to enjoin its publication of classified ads for rental housing in a "white home." Imposing a duty on the publisher to reject ads that violate the act was held not an unconstitutional burden because of the obvious intent element that is integral to the underlying violation:

> Finally, a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty to reject those that violate §3604(c). . . . [A] publisher can readily determine from the face of an advertisement whether it is intended to express a discriminatory preference. However the language of the advertisement is couched, the purpose of an advertiser who wishes to publish an advertisement in violation of the Act is to communicate his intent to discriminate and a newspaper publisher can divine this intent as well as any of his readers.

459 F.2d at 213. In affirming the trial court's finding of violation, the *Hunter* court held that "the indication of a racial limitation is precisely what the [advertiser] intended when he used the words 'white home'." *Id.*, 214. The D.C.

Circuit's decision appears to conflict with the decision of the Fourth Circuit in *Hunter* by disregarding the necessity for proof of the defendant's discriminatory intent.[7]

The threat of litigation and potential liability arising under the court of appeals' construction of section 804(c) would be severely intimidating to all but the most dauntless advertisers. Rather than attempt to determine the relevant market within which its ads will circulate and the respective proportions of various minorities in that market area to insure that models of each identifiable minority are fairly represented in its ads, most advertisers will simply avoid using human models at all lest they be attacked in court.[8] Creative work will inevitably be stifled by the lack of any standards providing guidance as to what a jury may later find racially preferential or prejudicial; one can imagine liability being imposed for otherwise neutral ads featuring depictions of George Washington, Thomas Jefferson or other "all white" founding fathers, or for not including enough hispanics, orientals or Sikhs.

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[7] The decision below cites *Saunders v. General Services Administration*, 659 F.Supp. 1042, 1058 (E.D. Va 1986), in support of its view that the Fair Housing Act is violated if a "reasonable reader" [*sic*; the term used in original text was "ordinary reader"] finds the defendant's ads to indicate racial preference without any showing of intent. However, the suggestion in *Saunders* that intent is unnecessary is merely dictum, since the district court in that case specifically found that the advertiser "intended to indicate preferences for certain types of tenants" and directed that black models not be depicted in the development's swimming pool.

[8] The respondents and others working in concert with them have already created a profitable cottage industry of suing real estate developers, advertising agencies and newspapers under section 804(c). *See, e.g., Spann v. Carley Capital Group*, 734 F.Supp. 1, 4-9 (D.D.C. 1989) (consent order providing for $325,000 payment by developers and advertising agencies to plaintiff group).

The point here is not that such liability will necessarily be imposed, but rather that the open-ended threat of such liability will have a deterrent and chilling effect on advertisers who have no discriminatory purpose whatever. *Long Island Vietnam Moratorium Committee v. Cahn*, 437 F.2d 344, 350 (2d Cir. 1970), *aff'd*, 418 U.S. 906 (1974) (where statutory proscription is vague, "a layman might refrain from conduct that is protected by the First Amendment for fear of coming too close to the line"). But if the court of appeals' statutory construction was correct, and liability arises when a jury determines, after the fact, that newspaper advertising was illegal solely because it could convey an improper message to a "reasonable reader," then the lack of comprehensible and explicit standards should render the act's advertising restrictions void for vagueness and overbreadth. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (vagueness test "applies with particular force in review of laws dealing with speech"); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

Colonial submits that the statutory construction applied by the district court in this case (and earlier by the Fourth Circuit in *United States v. Hunter*), which accommodates the First Amendment concerns, is the better approach, and the construction adopted by the court of appeals is seriously flawed. Under the district court's view, a violation cannot be found without some proof of discriminatory intent, either obvious on the face of the advertising itself (*e.g.*, "white home") or fairly inferable from extrinsic circumstances.[9] *Accord, Housing Opportunities Made Equal*

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[9] This assumes that aggregation of advertisements that appear over an extended period is permissible under section 804(c). A narrower but entirely plausible interpretation, based on the precise wording of the statute which covers only the singular publication of "any notice, state-

v. The Cincinnati Enquirer, Inc., 731 F.Supp. 801, 804 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir.). Because of the enormous significance of this issue for enforcement of the Fair Housing Act as to thousands of advertisers, advertising agencies and newspapers throughout the country and the potentially chilling impact that the court of appeals' ruling has on First Amendment interests, the Court should take this opportunity to resolve the matter.

II. The Decision of the Court of Appeals, Expanding the "Continuing Violation" Exception to Override the Congressionally-Mandated Statute of Limitations Even Where No Discrete Violation of Law Occurred Within the Applicable Period, Is in Conflict With Decisions of This Court.

The decision of the panel below is based on a novel and unduly expansive interpretation of the "continuing violation" doctrine, which was applied by the court of appeals to overcome the 180-day period of limitations set forth in 42 U.S.C. § 3612(a). In applying the continuing violation exception from the statutory time bar, the court of appeals relied on the articulation of that concept for purposes of the Fair Housing Act in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). However, *Havens* is significantly distinct from this case and does not support the appeals court ruling. The *sole* basis for invoking the doctrine against Colonial was an advertisement which appeared in *The Washington Post* on Saturday, April 26, 1986—exactly 180 days prior to the filing of the complaint on October 24, 1986. Plaintiffs asserted the April 26 ad was part of a

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ment, or advertisement", would not permit cumulative evaluation of a series of ads in the first place. Supporting this construction is the point that Congress could have added a phrase such as "or any series of advertisements" to this provision, if it had intended an aggregation approach.

pattern of racially preferential advertising. Standing alone, however, the April 26 ad (p.4, *supra*) is inoffensive and racially neutral. The situation is therefore entirely different from *Havens*, where "the last asserted occurrence" of the alleged pattern of violations was *itself* an overt act of illegal discrimination. (See App. A, 19a n.6, acknowledging this critical distinction.) The decision of the court of appeals thus expands the doctrine well beyond what was developed and approved in *Havens*

With its expansive application of the continuing violation theory to overcome the bar of limitations, the court of appeals' decision conflicts with a series of cases in which this Court has articulated the limits and conditions of using that concept to revive discrimination claims otherwise foreclosed by applicable statutes of limitations. *Lorance v. AT&T Technologies, Inc.*, 104 L.Ed.2d 961 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Although an ad for Colonial picturing a white couple did appear in the newspaper on the 180th day before the complaint, that was simply the automatic consequence and effect of campaign planning and media placement decisions and arrangements that necessarily occurred prior to that date; it would obviously be impossible for the defendant to arrange on a Saturday morning for a large display ad to appear in the newspaper that same morning. Whatever action the company took—whether legal or illegal under the Fair Housing Act—was over and done with by the time the April 26 ad was printed. The case thus should be controlled by *Lorance* and earlier Supreme Court decisions, which refused to apply continuing violation exceptions to revive statutory civil rights claims otherwise barred by limitations.

In *Lorance v. AT&T Technologies, Inc.*, the plaintiffs had been subjected to alleged discriminatory modification of their employer's seniority system but failed to commence legal action in a timely manner. 104 L.Ed.2d 961,

969. As a result of the later enforcement of the seniority plan, which itself was facially neutral, the plaintiffs suffered competitive detriments in their employment within the statutory limitations period. They argued that the continuing violation concept should allow them to proceed, because the facially nondiscriminatory seniority system had continuing adverse effects arising from its historically discriminatory genesis. The Court rejected this argument, emphasizing the critical difference between the time of the *discriminatory acts* versus the time when the *consequences* of those acts became "most painful." *Id.*, 971-72. Likewise in *Delaware State College v. Ricks*, the Court emphasized again that the critical issue is whether a *violation* occurred within the limitations period, as distinct from the appearance or occurrence of one or more effects of a previous discrimination; the focus must be "upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." 449 U.S. at 258 (citations omitted); *accord*, *Chardon v. Fernandez*, 454 U.S. 6, 9 (1987). And in *United Air Lines v. Evans* it was held that, while the employer's seniority system did have a continuing *impact* on the plaintiff's compensation, "the critical question is whether any present *violation* exists." 431 U.S. at 558 (emphasis in original). Even though her employer's policies gave continuing effect to a past act of discrimination, the plaintiff's claim based on the original discriminatory termination was barred, and that act was held to have "no present legal consequences." *Id.*

The import of these decisions is clear: time-barred discrimination claims do not revive simply because consequences of previous bad acts come to light or are felt within the limitations period. There must be at least one new incident of overt and palpable discrimination occurring within the applicable period in order to invoke the continuing violation doctrine.[10] *Malhotra v. Cotter & Co.*, 885

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[10] *McKenzie v. Sawyer*, *supra*, cited by the court of appeals to support

F.2d 1305, 1310 (7th Cir. 1989). That is consistent with *Havens*, where a discrete violation within the 180-day statutory period was the basis for reopening barred claims.

There is no evidence whatever that any act of discrimination was committed by Colonial within 180 days before the complaint was filed. The plaintiffs' continuing violation claim was based on a single advertisement (reproduced at page 4, *supra*), which appeared in the paper on the morning of the 180th day. It is clear that the April 26, 1986 ad did not itself violate the Fair Housing Act: the district court so held, and its ruling on that point was not disturbed by the court of appeals. (App. F, 39a; App. A, 19a n.6). It was only by coupling this facially neutral ad with previous publications of the same and similar ads that the plaintiffs and the court of appeals professed to find a theoretical violation of the Fair Housing Act. That approach cannot be reconciled with the continuing violation rulings of this Court, especially since any alleged illegal conduct by Colonial necessarily occurred some time before the day on which the subject advertisement was actually printed in *The Washington Post*.

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application of the continuing violation doctrine even where "no single act of the defendant would likely have violated Title VII" (App. A, p. 19a n.6), holds only that plaintiffs "need not show that the *entire violation* occurred within the actionable period" and there must be "a series of related *acts, one or more* of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period". 684 F.2d at 72, quoting *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982) (emphasis added). While the *McKenzie* opinion is somewhat opaque, the court does not appear to have held in that case that no violation need have occurred within the limitations period. It stated merely that prelimitations statistical evidence "can be used as indicative of [defendant's] practices continuing within the actionable period under Title VII", 684 F.2d at 73; the violative conduct at issue there included continued hiring and promotion actions affected by the employer's discriminatory animus. *Id.*, 70. However, if the court of appeals was correct in its description of the *McKenzie* holding on proof of a continuing violation, that case would appear to be of questionable validity after *Lorance*.

The only thing that actually happened within the limitations period was simply the consequence of pre-limitations period conduct. This Court should clarify that the Fair Housing Act's statute of limitations is not displaced by the continuing violation theory in that circumstance.

III. By Misapplying Questionable Precedent From This Court's *Arlington Heights* Decision and Ignoring More Recent and Apparently Controlling Authority, The Court of Appeals Improperly Allowed a Party With No Article III Standing to Remain as a Litigant in the Case.

During the past three decades, few issues of Constitutional law have proved more troublesome and complex than Art. III standing. Spann, *Expository Justice*, 131 U.Pa.L.Rev. 585, 618-27 (1983). This case presents an opportunity for the Court to eliminate confusion stemming from an apparent discrepancy between a footnote in the case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264 n.9 (1977), where individual and corporate plaintiffs were allowed to continue as parties in federal court litigation without separate evaluation of their standing, and the principle that constitutional standing requirements must be separately applied to each litigant seeking relief.

The court of appeals' decision holds that, because the two plaintiff organizations were found to have alleged injury sufficient to support their own standing, evaluation of the standing of the one individual plaintiff was not necessary. (App. A, 9a n.2). This ruling, allowing the individual plaintiff to stay on as a party in the litigation despite his manifest lack of any distinct and palpable injury, appears to conflict with the decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), and other standing decisions.

The lower court's reliance on footnote 9 in the *Arlington Heights* case to support its holding that the individual plaintiff's standing could properly be finessed because the *other* plaintiffs have standing, while superficially plausible, cannot withstand analysis. *Arlington Heights* is distinguishable on its facts, since it involved *only* claims for declaratory and injunctive relief asserted jointly on behalf of three individual plaintiffs and a real estate development corporation, but *not* individual claims for punitive or compensatory damages. 429 U.S. at 256-58. This Court has previously held that, for standing purposes, suits for damages must be viewed differently from those seeking only declaratory or equitable relief. *Warth v. Seldin*, 422 U.S. 490, 515-516 (1975); *cf. Secretary of Interior v. California*, 464 U.S. 312, 319 n.3 (1984), holding that certain plaintiffs' standing need not be addressed, since the State of California had standing to seek declaratory and injunctive relief against proposed federal action,and the position of the other plaintiffs "was identical to the State's"; *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (unnecessary to consider standing of Congressional plaintiffs and union, where one plaintiff clearly had standing to sue for declaratory relief); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) (declaratory and injunctive relief sought).

In contrast to *Arlington Heights*, the individual plaintiff in this case is not a mere tagalong. He asserts independent claims, in his own name and behalf, for compensatory and punitive damages as well as other relief against the defendants. Yet the only basis for standing alleged by this plaintiff is that he was "offended" by the real estate ads that he saw in *The Washington Post* and "incurred indignation" and "distress" as a result. (App. A, 9 n.2). He never applied to purchase or rent a unit in Colonial Village, has not had contact of any kind with the developer and, as a long time resident of Washington, D.C., does not claim to live in or near the neighborhood in which the project is located in Virginia.

It is settled that "psychological consequences presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III." *Valley Forge*, 454 U.S. at 485. Even "stigmatic injury" is insufficient, unless the plaintiff has been "personally subject to discriminatory treatment" regarding some concrete interest. *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984). Being angered or upset by what one sees in a newspaper, absent any kind of defamation or discrimination directed personally against the plaintiff, is simply not enough for Constitutional standing.[11] See Spann, *Expository Justice, supra*, at 624-25 and n.176.

This Court in *Valley Forge* underscored that parties who lack Article III standing "may not litigate as suitors in the courts of the United States." 454 U.S. at 475-76 (footnote omitted). In *Warth v. Seldin, supra*, 422 U.S. at 498, the Court earlier demonstrated that standing must be evaluated for each party and each particular issue, stating that, "[i]n essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." This determination always depends on whether a particular plaintiff has alleged a sufficient basis "to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's

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[11] Cases under Title VII of the 1964 Civil Rights Act, which was the model for Title VIII and deals with discriminatory advertising for employment in terms almost identical to those used in section 804(c) for real estate advertising, see 42 U.S.C. §2000e-3(b), have come to the same conclusion. *Banks v. Heun-Norwood*, 566 F.2d 1073 (8th Cir. 1977); *Hailes v. United Air Lines*, 464 F.2d 1006, 1008 (5th Cir. 1972) ("a mere casual reader" of discriminatory advertising prohibited by Title VII lacks statutory standing; plaintiff "must be able to demonstrate that he has a real, present interest in the type of employment advertised" and "that he was effectively deterred by the improper ad from applying for such employment"). The court of appeals was itself openly and properly skeptical that Congress would have intended the Fair Housing Act to afford relief to such a plaintiff, even assuming the Constitution would allow it. (App. A, 9a n.2).

remedial powers on his behalf." 422 U.S. at 498-499 (emphasis in original text; citations omitted). Neither *Valley Forge* nor *Warth* involved the precise issue raised here, but the strength of the Court's statements as to the Constitutional incapacity of plaintiffs who lack standing to litigate in federal courts leaves no room for an implied piggyback exception based on some other plaintiff's standing.[12]

In *Havens Realty Corporation v. Coleman*, *supra*, 455 U.S. at 374-75, standing was similarly evaluated on a party-by-party, issue-by-issue basis; those found inadequate for Art. III purposes, such as the claim asserted by a "tester" plaintiff under the Fair Housing Act who was given only accurate information regarding the availability of rental housing, were dismissed from the case.[13] Likewise in *Glad-*

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[12] The related issue of whether a party who has no Art. III standing may be permitted to intervene and participate as a party in litigation before the district court under Fed.R.Civ.P. 24(a)(2), in alignment with another qualified party, was expressly reserved in *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). See also *Sanduviches, Inc. v. Wendy's International, Inc.*, 822 F.2d 707, 710 (7th Cir. 1987), discussing the effect of consolidation on whether Art. III standing analysis is required as to all plaintiffs, another issue potentially impacted but not raised directly by this case.

[13] Citing *Havens*, 455 U.S. at 377-78, the court of appeals asserted that it "could not resolve" the individual plaintiff's standing without a remand permitting him to amend the complaint or to supplement the record in the district court. (App. A, 9 n.2). This exemplifies the panel's overall confusion on standing requirements. While *Havens* did allow such supplementary pleading and proof on remand as to the plaintiffs' standing, that occurred in the context of an ambiguous complaint and emerging doctrine regarding "neighborhood" standing. *Accord*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112-13 n.25 (1979). Here the complaint is not ambiguous, and the individual plaintiff, a District of Columbia resident, has not asserted neighborhood injury as entitling him to sue a Northern Virginia developer over its newspaper advertising. This Court has frequently dismissed parties and claims outright for want of standing without remands for further elaboration, and the court of appeals was not precluded from doing so here, based

stone, Realtors v. Village of Bellwood, 441 U.S. 91, 112-13 n.25 (1979), two plaintiffs who had inadequately alleged a basis for standing were dismissed from the case, while other plaintiffs who made sufficient allegations were allowed to stay in. *See also FW/PBS, Inc. v. Dallas*, 107 L.Ed.2d 603, 621-25 (1990) (plaintiffs held to have standing to assert certain claims but not others); *United States v. Alabama*, 828 F.2d 1532, (11th Cir. 1987), *cert. denied, sub nom. Board of Trustees of Alabama State University v. Auburn University*, 101 L.Ed.2d 894 (1988) (entities precluded from asserting claims for lack of standing, while other parties had standing to proceed for themselves and as class representatives); *League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied, sub nom. Schmertz v. Nassau County Board of Supervisors*, 469 U.S. 1108 (1985) (individual and organizational plaintiffs dismissed for lack of standing despite presence of other plaintiffs with standing); *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (eight plaintiffs dismissed for lack of standing to seek equitable relief from alleged constitutional violations, while three others with standing allowed to proceed).

The court of appeals' decision permitting the individual plaintiff to remain as a party and assert his private claims for damages cannot be reconciled with the statements of this Court in *Valley Forge, Warth* and other standing cases. On the other hand this Court has itself been the source of confusion, arising from the *Arlington Heights* footnote as well as similar rulings in declaratory relief and injunc-

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on the patently inadequate standing allegations in the complaint. See *Lujan v. National Wildlife Federation, supra*, 58 U.S.L.Week at 5083-84 (belated submissions to bolster inadequate allegations and affidavits on standing need not be considered in summary judgment proceedings); *Warth v. Seldin, supra*, 422 U.S. at 508, 518 (plaintiff's threshold responsibility is "clearly to allege facts demonstrating that he is a proper party to invoke . . . exercise of the court's remedial powers"); *accord, Whitmore v. Arkansas*, 109 L.Ed.2d 135, 145 (1990); *FW/PBS, Inc. v. Dallas*, 107 L.Ed.2d 603, 622 (1990).

tive actions such as *Secretary of Interior v. California* and *Bowsher v. Synar, supra*, and the Court should take this opportunity to clarify the rule. Especially where punitive and compensatory damages are demanded by a plaintiff with no cognizable claim to standing, the more recent decision in *Valley Forge* should have precedence over the *Arlington Heights* footnote.

On a Constitutional level, the federal courts are simply not empowered to hear claims for damages and other relief asserted by any party who lacks standing in his own right; and this is important on a practical level as well, since the presence and participation of additional parties without an objective stake in the controversy (other than hope for a windfall award of damages) is likely to affect the costs and logistics of the litigation and could affirmatively impede settlement prospects. The need to apply Art. III standing analysis is especially great in this case, where First Amendment interests are being directly attacked, and the plaintiff professes to be no more than a distressed newspaper reader.

Because the individual plaintiff did not allege or prove injury to himself sufficient to invoke federal judicial power under Art. III, this Court should make clear that he cannot be permitted to litigate his claims in the federal courts.

CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the judgment of the court of appeals.

Respectfully submitted,

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